Accordingly, with regard to billing and collection services, the Commission should require BOCs to provide these services in the same nondiscriminatory manner that governs their provision of such services to IXCs. Thus, the alarm monitoring service provider must be labelled clearly, on a separate bill page, so as to prevent any consumer from perceiving the billing entity as the alarm monitoring service provider. Moreover, the Commission should not allow compensation arrangements for billing and collection to be used as a vehicle for revenue sharing.

As noted in the *NPRM*, questions concerning what constitutes engaging in the provision of alarm monitoring services have arisen in conjunction with Southwestern Bell Telephone Company's ("SWBT") CEI Plan for Security Service.[34] SWBT's proposal underscores the need for clear rules designed to prevent end-runs around the prohibition established by Section 275(a)(1). Under that proposal, as described in the pending CEI plan, SWBT will:

(1) sub-contract out the central station alarm monitoring function to a selected alarm monitoring service provider (the end user will not participate in the selection);
(2) market the service offering as "SWBT Security Service" and perform all marketing and initial customer contact functions;

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[34] *NPRM* at ¶ 71, n.113; *Southwestern Bell Tel. Co. Comparably Efficient Interconnection Plan for Security Service*, CC Docket Nos. 85-229, 90-623 and 95-20, filed Apr. 4, 1996 ("*SWBT CEI Plan*"). AICC incorporates herein its comments and reply comments in opposition to that proposal. *See SWBT CEI Plan*, CC Docket Nos. 85-228, 90-623 and 90-20, *Comments of the Alarm Industry Communications Committee*, filed May 24, 1996.

(3) bill a single "lump sum" for the SWBT provided CPE and the alarm monitoring service offering;
(4) provide customer inquiry and contact functions for matters related to billing and marketing; and
(5) share in the revenues collected for the alarm monitoring service provider's provision of the central station alarm monitoring function by receiving a percentage of the alarm monitoring revenues.

In short, SWBT will provide all aspects of alarm monitoring service save the central station function itself. Indeed, SWBT has stated that it expects its identity to be associated with the alarm monitoring function in the public mind so completely that it will be necessary for SWBT to demand quality control standards of its alarm monitoring subcontractors which meet the "standards for quality and reliability that SWBT's customers expect SWBT . . . to meet".[35] This proposal, taken together with SWBT's monopoly control over the local services on which unaffiliated alarm monitoring service providers depend, highlights the very incentives to discriminate that Congress sought to eradicate with the prohibition contained in Section 275(a)(1).

If the type of proposal made by SWBT is found to be outside the "provision" of alarm monitoring services, then Section 275(b) will have no meaning. Following the SWBT example, every BOC could select a partner with which it will offer alarm monitoring, market alarm services to customers in its own name, provide all billing and other customer contact

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[35] *Id., Letter from Todd F. Silbergeld, Director-Federal Regulatory, SBC Communications, Inc., to William F. Caton, Acting Secretary, FCC*, dated July 3, 1996 at 2-3.

functions, and profit in direct relation to the success of the venture. The five year prohibition of Section 275(b) would stand for nothing.

To prevent the statute from being gutted, and to avoid a future drain on FCC resources created by further attempts at gamesmanship by BOCs seeking to circumvent Section 275(b), bright line guidelines should be adopted now.[36] Without a clear statement of the limits created by Section 275, experience suggests that the Commission will be subject to a constant barrage of creative BOC attempts to nullify Section 275. The guidelines suggested above will accomplish this purpose and preserve the true intent of Section 275.

D. The Commission Needs to Define the Terms of Section 275(a)(2) In Order to Prevent Further Violations of that Section by Ameritech (¶ 72)

Section 275(a)(2) states that a BOC providing alarm monitoring service prior to November 30, 1995 (Ameritech) "may not acquire any equity interest in, or obtain financial control of, any unaffiliated alarm monitoring service entity" until the five year moratorium established by Section 275(a)(1) expires on February 8, 2001.[37] The plain meaning of this statutory language is that Ameritech is prohibited from growth through acquisition. The only dealings that the statute permits Ameritech to have with unaffiliated alarm monitoring

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[36] Section 275 initially was thought to be a straightforward five year ban on BOC alarm monitoring services, with the exception of Ameritech which was allowed to retain its pre-existing business but not purchase others. In the six months since the 1996 Act was passed, however, SWBT has claimed it can perform all functions except actual operation of an alarm monitoring center, Ameritech has claimed it can purchase the *assets* of other alarm businesses, and U S West claims that it too is grandfathered.

[37] 47 U.S.C. § 275(a)(2).

companies is that it may exchange customer accounts with them. This narrow exception allowing for the exchange of customer accounts demonstrates that Congress' intent was to impose a complete bar on acquisitions by Ameritech.

Contrary to this common sense reading of the statute, Ameritech contends that Section 275 serves only to prohibit it from *stock purchases* of an unaffiliated alarm business and that *asset purchases* are allowed because they do not involve obtaining an "equity interest in" or "financial control of" another company.[38] In a recent filing with the Commission, submitted in response to AICC's Comments in the *SWBT CEI Plan* matter, Ameritech stated:

> . . . AICC opines that a "grandfathered" BOC is prohibited from growing its grandfathered operations by the "purchases of customer contracts." . . . However, this alleged prohibition is nowhere to be found in Section 275.[39]

Ameritech later underscored its position in press statements made with respect to its recent Circuit City acquisition:

> Ameritech had acquired two security companies before this year's Telecommunications Act prohibited the Baby Bells from acquiring equity stakes in security companies for five years. Ameritech said its acquisition of

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[38] *SWBT CEI Plan*, CC Docket Nos. 85-229, 90-623 and 95-20, *Reply Comments of Ameritech Corporation*, filed June 7, 1996 ("*Ameritech Reply Comments*") at 5.

[39] *Id.* On August 12, 1996, AICC filed with the Common Carrier Bureau a *Motion for Orders to Show Cause and to Cease and Desist* concerning Ameritech's purchase of Circuit City's alarm monitoring business. *Enforcement of Section 275(a)(2) of the Telecommunications Act of 1996 Against Ameritech Corporation*, CCBPol 96-17 (notice rel. Aug. 23, 1996).

> Circuit City's monitoring division is allowable because it doesn't count as taking an equity stake.[40]

Thus, under Ameritech's reading of the statute, purchases of customer contracts and other alarm business assets are not prohibited.

Such an interpretation, however, eviscerates the statute and is completely nonsensical. In enacting Section 275(a)(2), Congress surely did not intend to dictate merely the legal form of Ameritech's acquisitions—it meant to prohibit them entirely.[41] This is

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[40] *Fort Lauderdale Sun-Sentinel*, July 7, 1996.

[41] On February 1, 1996, Senators Harkin (D-IA), Hollings (D-SC) and Pressler (R-SD) engaged in a floor colloquy intended to make clear the intention to prohibit for five years Ameritech's acquisition of other alarm companies. As excerpted from the *Congressional Record*, the Senate Floor Colloquy reads:

> **MR. HARKINS** [sic]. The bill and the report language clearly prohibit any Bell company already in the industry from purchasing another alarm company for 5 years from date of enactment. However, it is not entirely clear whether such a Bell could *circumvent* the prohibition by purchasing the underlying customer accounts and assets of an alarm company, but not the company itself. It was my understanding that *the conferees intended to prohibit for 5 years the acquisition of other alarm companies in any form, including the purchases of customer accounts and assets.* I would ask both the chairman and ranking member whether my understanding is correct? [sic]
>
> **MR. PRESSLER.** Yes; the understanding of the Senator is correct. *The language in the bill designed to prevent further acquisitions by a Bell engaged in alarm monitoring services as of November 30, 1995, is intended to include a prohibition on the acquisition of the underlying customer accounts and assets by a Bell during the 5-year waiting period.*
>
> This would not prohibit, as is stated in the bill, the so-called swap of accounts on a comparable basis, whereby a Bell which was engaged in alarm

(continued...)

evidenced by Congress' insertion of language that allows for the exchange of customers with unaffiliated entities. This is the *only exception* to the five year prohibition. Common sense dictates that if Congress took the time to explain that the prohibition on Ameritech's acquiring "an equity interest in, or financial control of, any unaffiliated alarm monitoring service entity" does not preclude the *exchange* of customers, surely it would have explained that purchases of customer accounts and other assets also are not precluded by the prohibition—if that is what it had intended.

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[41](...continued)

> monitoring as of November 30, 1995, would be allowed to swap, or exchange, existing customer accounts for a similar number and value of customer accounts with a non-Bell alarm company.
>
> **MR. HOLLINGS.** I would agree with the explanation given by the chairman and am pleased to have this opportunity to further clarify our intent in the alarm industry provisions.

142 Cong. Rec. S689 (daily ed. Feb. 1, 1996)(emphasis added). Commenting on the Senate Floor Colloquy, Former Senate Majority Leader Dole (R-KS) also gave his nod of approval to the Senators' mutual understanding of the congressional intent underlying Section 275:

> **MR. DOLE.** I have read the colloquy. I do not see any problem with it.

Id. at S686.

Although the legislative history also includes the individual remarks of Congressmen Hyde (R-IL) and Oxley (R-OH) to the contrary, neither statement allowed for response by other legislators and together, at most, they represent the views of two individual Congressmen (both of whom represent districts within Ameritech's service territory). The Senate colloquy, by contrast, involved an open discussion by the principal architects of the Telecommunications Act of 1996, and is most indicative of Congress' intent.

Moreover, whether Ameritech purchases assets or stock, the incentives underlying Congress' concerns remain the same. As a BOC, Ameritech has monopoly control over services necessary to perform alarm monitoring and, as a group, BOCs historically have demonstrated a tendency to use this monopoly control anticompetitively. Additionally, it is absurd to suggest that Congress intended to bar the other BOCs from the alarm monitoring industry so that Ameritech would have a five year window in which to consolidate its hold on the market free from competition from some its biggest potential rivals.[42] Thus, Ameritech's reading of Section 275(a)(2) not only flies in the face of common sense—as it would create anticompetitive incentives no different than would be the case with forbidden stock purchases and allow Ameritech an unfair advantage over other BOCs—it renders Section 275(a)(2) a nullity. The statute was not intended merely as a suggestion that Ameritech use one means of acquisition—asset purchases—rather than another.

Ameritech's inability to adhere to the statute unfortunately makes it necessary for the Commission to clarify the meaning of the terms of Section 275(a)(2). Specifically, AICC proposes that the term "equity interest" be defined as any ownership of a company by stock or partnership shares. With respect to the term "financial control", AICC submits that this is intended to be a broad concept that complements the narrow definition of equity interest. It does not, by definition, require actual ownership of a company (for that would be

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[42] According to Ameritech, it is already the second largest provider of alarm monitoring services. *See, e.g., Letter to General Alarm from Gerald J. DeNicholas, Director of Business Development, SecurityLink from Ameritech.*

an equity interest).[43] As broadcast cases on the issue of what constitutes control prove, the "definition [of 'control'] encompasses 'every form of control, actual or legal, direct or indirect, negative or affirmative.'"[44] Accordingly, financial control should be defined to include ownership of the assets through a purchase of all or part of the assets of an unaffiliated alarm monitoring service entity. Financial control also may be indicated by ownership of debt instruments or liens on property. As the Commission has recognized with respect to its broadcast ownership cases, financial control is often disguised and is best addressed on a case-by-case basis.[45]

With respect to the conditions under which an "exchange of customers" would be consistent with the Act's purposes, AICC notes that its interpretation of the terms "equity interest" and "financial control" are necessary to give meaning to this exception granted by Congress. If "financial control" did not encompass acquisition of customer accounts, there

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[43] For example, in its analysis of what constitutes control under Section 310(b) of the Act, the Commission has recognized that "a realistic definition of [the word 'control'] includes any act which vests in a new entity or individual the right to determine the manner or the means of operating the licensee . . . ." *Powell Crosley, Jr.*, 11 F.C.C. 3, 20, 3 R.R. 6, 23 (1945).

[44] Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, Vol. 43, No. 3 FED. COMM. LAW. J. 277, 295 (July 1991).

[45] *See e.g., Stereo Broadcasters, Inc.*, 55 F.C.C. 2d 819, 821 (1975), *modified*, 59 F.C.C.2d 1002 (1976)("The ascertainment of control in most instances must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented."); *Turner Broadcasting System, Inc.*, 101 F.C.C. 2d 843, 848, 58 R.R.2d 1507, 1510 (1985).

would have been no need to clarify that the prohibition or acquiring financial control nevertheless permitted an exchange of accounts. Moreover, it is hard to imagine why Congress specified that Ameritech could *exchange* accounts if, as Ameritech asserts, it could buy them outright.

In short, Congress did not intend for this sole exception to the prohibition on Ameritech financial transactions with unaffiliated alarm monitoring companies to be used as a vehicle for Ameritech to embark on a buying spree. Rather, it is intended to provide Ameritech with flexibility so that it can manage and realign customer accounts acquired in several pre-1996 Act alarm monitoring company purchases. To stay true to the purposes of Section 275(a)(2), such exchanges must be reciprocal and limited to the exchange of customer accounts only. That is, exchanges must involve Ameritech trading its own customer accounts for customer accounts of an unaffiliated entity of roughly equal value—cash incentives or supplements are not contemplated by the statute and should not be permitted.[46]

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[46] Exchange is defined as "to trade for something of equal value." *Webster's II New Riverside University Dictionary* at 450 (1984).

E. The Nondiscrimination Provisions of Section 275(b)(1) Apply in Conjunction with Those In Other Sections of the Act

Section 275(b)(1) requires that an incumbent LEC[47] "provide nonaffiliated entities, upon reasonable request, with the network services it provides to its own alarm monitoring operations, on nondiscriminatory terms and conditions."[48] Although AICC agrees that Sections 201 and 202 collectively place significant nondiscrimination obligations on incumbent LECs,[49] AICC does not see this as a reason to write the provisions of Section 275(b)(1) out of the statute. Section 275(b)(1) places an independent obligation upon the incumbent LECs above and beyond the requirements of Section 201 and 202. Indeed, Section 275(b) is more appropriately analogized to Section 251(c)(3) of the Act. Section 251(c)(3) requires incumbent LECS to make "network elements" available to telecommunications carriers so that they may make use of those elements to provide their own, competing services. Section 275(b) applies this pro-competitive unbundling principle to the alarm monitoring context, where most of the incumbent LECs' competitors are not "telecommunications carriers". Thus, whereas Section 251(c)(3) requires "network *elements*" for carriers, Section 275(b) requires that unaffiliated alarm monitoring providers receive

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[47] AICC agrees with the Commission's analysis and conclusion that the definition of "incumbent LEC" found in Section 251(h) applies for Section 275(b) as well.

[48] 47 U.S.C. § 275(b)(1).

[49] *NPRM* at ¶ 74.

access to "network *services*" the incumbent LEC uses for its own operations.[50] Accordingly, the Commission should make clear that, regardless of whether the incumbent LEC's action is an unreasonable discrimination under Section 201 and 202, an incumbent LEC does not satisfy Section 275(b)(1) unless it has made all network services it uses in its own alarm monitoring operations available to unaffiliated alarm monitoring providers also.[51]

As to the applicability of *Computer III* and *ONA*, AICC agrees that these requirements should continue to apply to BOC alarm monitoring services (and other enhanced services). These requirements are consistent with Section 275(b)'s nondiscrimination obligation, and nothing in Section 275 indicates that Congress intended to repeal those requirements. Thus, the Commission should require a BOC to demonstrate compliance with the *Computer III* CEI plan requirements as a precondition to its provision of alarm monitoring services.

III. Enforcement Issues With Respect to Alarm Monitoring (¶¶ 81-84)

A. Establishing a *Prima Facie* Case and Shifting the Burden of Proof (¶ 82)

AICC submits that a complainant meets its *prima facie* obligation if it pleads facts, which if true, state a case. Such a standard is consistent with the Commission's existing

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[50] "Network services", like network elements, should be interpreted in a flexible manner to include not only traditional telecommunications services, but also the features, functionalities and capabilities available through those services. *Cf.* 47 U.S.C. § 153(3)(45).

[51] Significantly, however, unlike Section 251(c)(3), Section 275(b)(1) does not create an obligation for the incumbent LEC to offer network services it does not itself use.

formal complaint rules,[52] and also is consistent with standards traditionally recognized by courts to determine when a case should go to the jury.[53] To require a higher burden would minimize substantially an injured party's ability to bring complaints before the Commission and would weaken the agency's ability to enforce complaints filed pursuant to Section 275(c).

Upon the plaintiff's establishment of a *prima facie* case, the burden should shift to the defendant.[54] Because, in most instances, the key facts and information will be in the control of the defendant LEC, shifting the burden of proof is the most economical way to ensure full achievement of the enforcement provisions of the Act. For example, only the defendant LEC will have all the necessary documents concerning transactions between it and its alarm monitoring affiliate and between it and unaffiliated alarm monitoring service entities. Given that the Commission's complaint procedures provide for very little discovery,[55] it would be unfair to require plaintiffs to produce pertinent information

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[52] 47 C.F.R. § 1.720(b).

[53] Wright & Miller, *Federal Practice and Procedure*, § 1202.

[54] The Commission reached the same conclusion in its *BOC In-Region NPRM*. *BOC In-Region NPRM* at ¶ 102. In the *BOC In-Region NPRM*, the Commission reasons that "[b]ecause the defendant BOC is likely to be in sole possession of information relevant to the complainant's case, and because the complaint must be acted upon in 90 days, we believe that shifting the burden may be an efficient way of resolving complaints invoking the expedited procedures of Section 271(d)(6)." *Id.* Although Section 275(c) provides for Commission resolution of complaints within 120 days, AICC believes the same rationale is applicable.

[55] *See* 47 C.F.R. §§ 1.729, 1.730.

regarding the activities of a transaction to which it was not a party. By shifting the burden to the defendant, the Commission can better assure that the defendant LEC will submit all necessary documents related to the transaction in attempts to prove its innocence.

Further, AICC urges the Commission not to adopt a presumption of reasonableness in favor of an incumbent LEC or its alarm monitoring affiliate. The Commission reached a similar tentative conclusion in the *BOC In-Region NPRM*.[56] To extend such a presumption would inhibit achievement of the goals of Section 275 in particular and the Act in general. While AICC would like to believe that all parties—incumbent LECs, their affiliates and competitors alike—always act consistently with the pro-competitive goals of the Act, experience suggests that this is unlikely. Accordingly, AICC submits that any application of a presumption of reasonableness to an incumbent LEC's activities is premature at this time.

Finally, AICC submits that the Commission should decide Section 275(c) complaints alleging anticompetitive or discriminatory behavior in violation of Section 275(b) on a case-by-case basis. Because complaints may involve, among other things, varying network services and affiliate relationships that are capable of producing a virtually endless series of permutations, AICC believes that it would be unwise for the Commission, at this point, to adjudicate claims through the rulemaking process. Moreover, employing a case-by-case method of adjudicating claims is most appropriate at this juncture because it provides the

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[56] *See BOC In-Region NPRM* at ¶ 104.

Commission with the flexibility needed to interpret varying factual situations and decide new issues as they arise.

B. Material Financial Harm (¶ 83)

Section 275(c) requires complainants availing themselves of the expedited complaint procedures to establish "material financial harm".[57] In this respect, AICC notes that because discrimination results in a prospective harm that is virtually impossible to quantify, the concept of "material financial harm" must include non-quantifiable as well as quantifiable harm. Defendant LECs should not be able to shift the burden of proof merely because the effects of their discrimination are prospective and nearly impossible to quantify.

Accordingly, AICC submits that, *per se*, an allegation of discrimination or denial of a necessary service constitutes "material financial harm" for the purposes of this section. To ensure certainty in the processing of complaints, the showing required should be limited to establishment of a *prima facie* case of material financial harm.[58] AICC believes that such an approach is necessary to establish certainty as to whether complaints will be processed and discourage incumbent LECs from engaging in violations of Section 275(b). The proposed alternative of deciding the materiality of the harm on an individual case basis would provide neither of these benefits.

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[57] 47 U.S.C. § 275(c).

[58] If a complaint does not allege material financial harm, AICC believes that it would be in the Commission's discretion to process such a complaint on an expedited basis.

C. Cease and Desist Orders (¶ 84)

AICC submits that establishment of a *prima facie* case constitutes an "appropriate showing" for the Commission to issue the LEC an order "to cease engaging" in an alleged violation of Section 275. Pursuant to Section 275(c), the Commission "shall, within 60 days after receipt of the complaint, order the incumbent local exchange carrier (as defined in section 251(h)) and its affiliates to cease engaging in such violation pending such final determination."[59] Thus, once an appropriate showing has been made the Commission must order the defendant LEC "to cease engaging" in the disputed activity. Such an order may include a negative injunction (*i.e.*, refrain from engaging in the disputed practice) or an affirmative requirement (*i.e.*, begin providing a particular network service).

Finally, upon final determination, the Commission, pursuant to its general powers under the Act,[60] may issue remedial orders including cease and desist orders and orders of revocation. Without such authority, Commission review and determination of complaints would be rendered meaningless and the goals of Section 275 could not possibly be achieved.

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[59] 47 U.S.C. § 275(c).

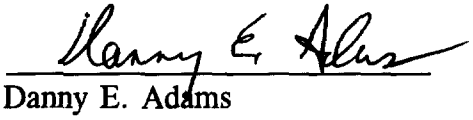
[60] *See, e.g., Id.* § 154(i).

CONCLUSION

For all the foregoing reasons, the Commission should adopt the rules and policies proposed in the *NPRM*, as modified by the preceding discussion.

Respectfully submitted,

ALARM INDUSTRY COMMUNICATIONS COMMITTEE

By: 

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